TAN YIEN SIONG

v.

TAN POI MENG

HIGH COURT MALAYA, JOHOR BAHRU
SYED AHMAD HELMY JC
[CIVIL SUIT NO: 22-516-2000]
21 MARCH 2001

CIVIL PROCEDURE: *Summary judgment - Specific performance - Agreement for sale of land - Triable issues - Whether established - Rules of the High Court, O. 81 r. 1*

CIVIL PROCEDURE: *Specific performance - Agreement for sale of land - Whether specific performance to order*

The plaintiff entered into an agreement with the defendant involving the transfer of a piece of land ("the first property"). When the defendant failed to effect the transfer, the plaintiff applied for summary judgment for specific performance under O. 81 r. 1 of the Rules of the High Court 1980 ("the RHC") for another piece of land ("the subject property"). The plaintiff alleged that the defendant had agreed to substitute the first property with the other.

The defendant submitted that there were triable issues and therefore the dispute ought not be disposed of summarily.

Held:

[1] Order 81 r. 1 of the RHC provides a similar procedure to O. 14 in that where there is no triable defence to the action, the plaintiff could obtain a summary judgment in an action for specific performance of contract for the sale and purchase of land without the necessity of a full trial. (p 76 b)

[1a] The differences between the aforementioned provisions are that there is no necessity for the plaintiff to await entry of appearance before making the application and the supporting affidavit cannot be affirmed by any person but one who can positively swear to the facts verifying the cause of action. In addition, the summary procedure is not available to a counter-claiming defendant and the application must relate to the whole action and have attached thereto minutes of the judgment sought. (p 76 c)

[2] The subject matter of the sale and purchase agreement was not an arguable issue as submitted by the defendant. The plaintiff had submitted sufficient evidence and this was further substantiated by the evidence of a deposition on oath made by one Lim Teck Guan that proved the existence of agreement and its due execution by both the plaintiff and defendant. (p 78 e-f)

[3] The defendant could not convince this court that a triable issue existed in the form of another agreement with another party. The subject matter and the parties involved in the said agreement were different. Furthermore, it had not been stamped and it had never been executed by the plaintiff. (p 79 c)

[4] The parties had signed the agreement and the plaintiff was not refunded the sum of RM35,000 which was paid in relation thereto. It was clear that the plaintiffs were entitled to the remedy of specific performance. (p 79 h)

[5] The agreement was clearly one of alternative promises. By s. 59 of the Contracts Act 1950, in situations where one branch is legal and the other is not, the legal branch alone can be enforced. (p 80 b)

[5a] The defendant's argument that he had no registered interest in the first property did not render the promise pertaining to the substituted property unenforceable. (p 80 c)

[Application granted.]

Case(s) referred to:

Bank Negara Malaysia v. Mohd Ismail Ali, Johor & Ors [1992] 1 CLJ 627; [1992] 1 CLJ (Rep) 14 ***(refd)***

Chuah Seow Keng & Anor v. Rhina Bhar @ Rani Raj Pal [1997] 3 CLJ 799 ***(refd)***

Curtis v. Chemical Cleaning & Dyeing Co Ltd [1951] 1 All ER 631 ***(refd)***

Karthiyayani & Anor v. Lee Leong Sun & Anor [1975] 1 MLJ 119 ***(refd)***

L'Estrange v. F Graucob Ltd [1934] 2 KB 394 ***(refd)***

Peninsular Land Development Sdn Bhd v. K Ahmad [1970] 1 MLJ 149 ***(refd)***

Voo Min En & Ors v. Leong Chung Fatt [1982] 2 MLJ 241 ***(refd)***

Legislation referred to:

Contracts Act 1950, s. 59

Rules of the High Court 1980, O. 14, O. 81 r. 1

For the plaintiff - T Gan; M/s Gan & Lim
For the defendant - LH Ng; M/s Ng & Ng

Reported by M Maheswaran

JUDGMENT

Syed Ahmad Helmy JC:

The summons-in-chamber in encl. 8 relates to an application by the plaintiff for summary judgment for specific performance of the sale of the land known as HS(M) 1252 PTD 2372 Mukim Machap by the delivery of the original title thereof and the execution of the transfer by the defendant of the said land to the plaintiff pursuant to O. 81 r. 1 of the Rules of the High Court. The plaintiff has also made an alternative claim for damages, interest and costs.

The plaintiff's claim as appears by the affidavits in encls. 8A and 17 is founded on the agreement dated 30 December 1998 executed by the plaintiff and defendant and duly witnessed by one Lim Teck Guan who is the Ahli Majlis Daerah Kluang Selatan (hereinafter called the agreement). It was the plaintiff's contention that it was a term of the agreement that should the defendant fail to obtain the approval of the relevant authorities for the transfer of the land known as Lot 1742 Mukim Hulu Benut, Daerah Kluang (hereinafter called the first property) on or before 1 April 2000 the defendant shall replace it with the land held under HS(M) 1252 PTD 2372 Mukim Machap, which is the Land the subject matter of the plaintiff's application herein (hereinafter called the subject property).

The plaintiff further avers that pursuant to the agreement he paid the sum of RM35,000 as part payment towards the purchase price of RM55,000 and the defendant handed to him the site plan of the subject property duly certified by him. By reason of the aforesaid the plaintiff contends that he is entitled to the decree of specific performance of the subject property as prayed.

The defendant on the contrary submits that by reason of the conflicting versions as born out by the affidavit evidence the plaintiff's application is not one fit for disposal summarily and in the light of the various triable issues the matter ought to be ventilated through the process of a full trial. The triable issues advance by the defendant is fourfold:

1. Whether the sale and purchase herein relates to the subject property or to another piece of land known as GSA 1226 belonging to Lim Bon Hoi.

2. Whether the deposit of RM35,000 was the deposit for the subject property or the GSA 1226 property belonging to Lim Bon Hoi.

3. Whether in relation to the subject property the defendant was a seller or broker.

4. Whether the defendant has the right to dispose of the first property which is government land and if he does not have the right whether the term pertaining to the substitution of the subject property can be valid.

Before adverting to the affidavit evidence to ascertain whether or not the issues raised are triable issues that merits full trial it is only appropriate to relate the general principles regulating the summary judgment procedure as laid down in O. 81 RHC.

It is pertinent to note that O. 81 provides a procedure similar to O. 14 in that it enables a plaintiff where there is no triable defence to the action to obtain summary judgment in an action for specific performance of a contract (irrespective of whether it is orally made or in writing) for the sale and purchase of land without the necessity of a full trial.

Though the summary procedure is similar nevertheless there are striking procedural differences amongst them in that there is no necessity for plaintiff to await entry of appearance before making the application and the supporting affidavit cannot be affirmed by any person but one who can positively swear to the facts verifying the cause of action. The other material difference is that the summary procedure is not available to a counterclaiming defendant and the application must relate to the whole action and have attached thereto minutes of the judgment sought.

As O. 81 relates to summary disposal of claim the main issue would be whether there are triable issues which would defeat the plaintiff's assertion that the case is suitable for summary disposal.

The burden that the defendant has to discharge resisting an O. 81 application was appropriately stated by his Lordship Salleh Abas FJ (as he then was) in the case of *Voo Min En & Ors v. Leong Chung Fatt* [1982] 2 MLJ 241 at p. 243.

> That being the case, it is not enough for the respondent in answer to the appellant's application to sign final judgment, to raise an issue, or any issue. He must, however raise such issue as would require a trial in order to determine it. In other words, the issue raised must be an arguable issue. But where the issue raised is irrelevant and ineffective, or to use the words of Lord Greene M.R. in *Cow v. Casey* [1949] IKB 474 at page 481 "when the point is understood and the Court is satisfied that it is really unarguable" the appellants should be entitled to what they prayed for in the Summons-in-Chambers.

Closer to the point is the statement of his Lordship Azmi LP in *Peninsular Land Development Sdn Bhd v. K Ahmad* [1970] 1 MLJ 149:

> As a general rule, where a defendant shows that he has a fair case for a defence or reasonable grounds for setting up a defence or even a fair probability that he has a *bona fide* defence he ought to be given leave to defend ... but the discretion lies with the judge and the defendant must show such facts as might be deemed sufficient to entitle him to defend.

Turning to the evidence in this case can the averment of conflicting version as to the agreements that it sought to enforce amounts to an arguable issue. In order to ascertain whether it amounts to an arguable issue let us scrutinise the evidence adduced by the defendant in support of his contention.

In the statement of defence dated 20 October 2000 the defendant not only denies agreeing to sell the first property or *in lieu* thereof the subject property but disputes the existence of the agreement on the ground that he never executed the agreement in the presence of any solicitors - paras. 2, 3 and 7 of the defence.

He again reiterates through affidavit evidence in encl. 10 that he never saw or executed the agreement and demanded that the plaintiff prove that the agreement is a valid document as it was not signed before a solicitor - para. 4 thereof. He then, after strenuously denying that he did not know the existence of the agreement nor executed same, avers that the term relating to the substitution of the first property with the subject property as appears at the bottom of the agreement after the execution paragraph but before the attesting witness paragraph is an addition as it was typed in through a typewriter and not by the original computer.

He also, for the first time (as it does not appear in the defence) contends that he was acting for a broker in relation to another agreement dated 5 January 1999 in respect of a piece of land held under GSA 1226 Mukim Nyior belonging to Lim Bon Hoi @ Lim Boon Kok which the plaintiff had agreed to purchase and exhibits the agreement as "TPM1" in his affidavit in encl. 10.

At this juncture I wish to highlight that the agreement dated 5 January 1999 though appearing to be signed by Lim Bon Hoi, does not have the signature of the plaintiff and the manner of payment of the purported deposit of RM35,000 inserted therein is left blank.

The defendant then exhibits a receipt issued by the Pentadbiran Tanah Johor in his additional affidavit in encl. 12 and marked as exhibit "TPMA" and contends that the receipt evidences that the land held under GSA 1226 is now registered in the name of the plaintiff.

The reason behind exhibiting the receipt is the defendant's attempt to refute the evidence adduced by the plaintiffs relating to the payment and the agreement it sought to enforce, in that it cannot be maintained as the transaction relates to the sale & purchase of GSA 1226 from Lim Bon Hoi of which the defendant was merely acting as a broker.

Are the various issues raised by the defendants arguable issues which merits a full trial when evaluated against the evidence adduced by the plaintiff through his several affidavits?

In determining whether or not there are arguable issues I am minded of the sage words of Mohd Azmi SCJ in *Bank Negara Malaysia v. Mohd Ismail Ali, Johor & Ors* [1992] 1 CLJ 627; [1992] 1 CLJ (Rep) 14 wherein he laid down the guideline for the court to adopt in relation to conflicting affidavits in summary judgment application. His Lordship at p. 631 (p. 19) stated:

> Under an Order 14 application the duty of a Judge does not end as soon as a fact is asserted by one party, and denied or disputed by the other in an affidavit. Where such assertion denial or dispute is equivocal, or lacking in precision or is inconsistent with undisputed contemporary documents or other statements by the same deponent or is inherently improbable in itself, the judge has a duty to reject such assertion or denial, thereby rendering the issue not triable. Unless this principle is adhered to, a judge is in no position to exercise his discretion judicially in an O. 14 application.

Bearing that guideline in mind it is my considered view after evaluating the affidavit evidence that it involves the construction of a written document namely the agreement and the prevailing circumstances at the time of the execution.

That the validity of the agreement, namely its existence and its due execution by both the plaintiffs and the defendants and the fact of payment of the deposit of RM35,000 *vide* Arab Malaysian Bank Berhad cheque No. 001862 crossed and made payable to the defendant and accepted by him is more than amply established by the plaintiff not only through his deposition on oath but also through the deposition on oath of the attesting witness Lim Teck Guan the Ahli Majlis Daerah Kluang Selatan in his affidavit in encl. 17 which attesting witnesses evidence remains unchallenged and unrebutted. I would at his juncture advert to the statement made by Raja Azlan Shah FJ (as His Majesty then was) in the Federal Court case of *Karthiyayani & Anor v. Lee Leong Sun & Anor* [1975] 1 MLJ 119 at p. 120:

> If a witness is independent *ie*, if he has no interest in the success or failure of a case and his evidence inspires confidence of the court, such evidence can be acted upon.

The sworn evidence of Lim Teck Guan who is an independent witness and as conceded by defendant's counsel that his credibility is not disputed puts paid to the defendant's contention that the agreement did not bear his signature. I am convinced by the evidence before me that not only has the defendant executed the agreement but he agreed to all the terms and conditions appearing therein. The contention that the additional term of substitution was inserted

later cannot be accepted by this court in the absence of supporting evidence. Again the defendant has acted upon the agreement by his acknowledgment that the cheque for RM35,000 has not been returned to the plaintiff. In point of fact it is indeed baffling for the court to accept his contention of the cheque being handed to Lim when the cheque that was given to him was not only in his name but crossed and the fact that the cheque was crossed as such and in the absence of any rebuttal evidence the court can safely conclude that it cannot be cashed by any other person. That being the case there is no merit whatsoever in the defendant's contention and the fact of acknowledgment and the fact that it was never returned clearly establishes the defendant's liability.

The defendant's desperate attempt to throw a red herring in the form of another agreement with another party cannot amount to a triable issue for not only is the subject matter of the agreement different and the parties different, it was also not stamped and the manner of payment of the deposit of RM35,000 left in blank and but more importantly it was never executed by the plaintiff.

The legal position as established by the case of *L'Estrange v. F Graucob Ltd* [1934] 2 KB 394 is that once it is established that a person executes a document then in the absence of fraud or misrepresentation he is bound by the terms therein irrespective of whether he has read the document or not. The law is quite clear that when a party signs a contract knowing it to be a contract which govern the relations between them then his signature is irrefragable evidence of his assent to the whole contract, including the exempting clauses, unless the signature is shown to be obtained by fraud or misrepresentation - *Curtis v. Chemical Cleaning & Dyeing Co Ltd* [1951] 1 All ER 631. The fact of the execution being established by an independent witness clearly puts this case within the principle established aforesaid.

In the Court of Appeal case of *Chuah Seow Keng & Anor v. Rhina Bhar @ Rani Raj Pal* [1997] 3 CLJ 799 where in a situation where the agreement was not signed by the vendors, though duly signed by the purchaser and the late return of the 10% deposit was held by the Court of Appeal nevertheless to be a concluded contract which entitled the purchaser therein to specific performance.

The case here is stronger for not only was the agreement upon the terms of the agreement signed by the parties but also the deposit of RM35,000 was up to date not returned to the plaintiffs. By reason thereof it seems clear to me that the defendant has breached the agreement for which the plaintiffs are entitled to the remedy of specific performance as prayed.

The fact that the first property as mentioned in the agreement was at the relevant time still not registered in the name of the defendant cannot exculpate the defendant from his obligation to transfer the substituted land in the form of the subject property over which he is the registered owner and which is expressly mentioned in the agreement. The agreement herein is clearly one of alternative promises and as provided for by s. 59 of the Contracts Act 1950, in the case of an alternative promise, one branch of which is legal and the other illegal, the legal branch alone can be enforced. Hence even if the first property cannot be enforced because the defendant has no registered interest therein, it does not mean that the promise relating to the substituted land cannot be enforced. The provisions of s. 59 Contracts Act speaks for itself and is clearly applicable to the facts at hand, and accordingly I find that the promise relating to the substituted land can be enforced. Furthermore if the defendant had not agreed he would have at least returned the cheque of RM35,000 and failure to do so merely strengthens the plaintiff's case of seeking the declaration which is sought herein.

In the light of the aforesaid I find that there are no triable issues raised by the defendant and the upshot of it all is that the plaintiffs are entitled to the reliefs sought in encl. 8 upon the terms of the minute of the judgment annexed thereto.